

SERVICE DATE - LATE RELEASE MAY 6, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-124 (Sub-No. 2)

WATERLOO RAILWAY COMPANY  
– ADVERSE ABANDONMENT –  
LINES OF BANGOR AND AROOSTOOK RAILROAD COMPANY AND VAN BUREN  
BRIDGE COMPANY IN AROOSTOOK COUNTY, MAINE

STB Docket No. AB-279 (Sub-No. 3)

CANADIAN NATIONAL RAILWAY  
– ADVERSE DISCONTINUANCE –  
LINES OF BANGOR AND AROOSTOOK RAILROAD COMPANY AND VAN BUREN  
BRIDGE COMPANY IN AROOSTOOK COUNTY, MAINE

Decided: May 6, 2003

The motion of the Trustee (Trustee) of the Bangor and Aroostook Railroad Company (BAR) to compel Fraser Papers, Inc. (Fraser) to respond to discovery requests, or, in the alternative, for issuance of a subpoena duces tecum, is granted to the extent discussed in this decision.

BACKGROUND

On November 14, 2002, the Trustee filed a notice of intent to file an application for the adverse discontinuance of the trackage rights acquired by the Canadian National Railway Company (CN) in STB Docket No. AB-279 (Sub-No. 3) and a notice of intent to file an application for the adverse abandonment of the operating easement acquired by CN's subsidiary, the Waterloo Railway Company (Waterloo), in STB Finance Docket No. AB-124 (Sub-No. 2). The same line is involved in both proceedings. The line herein, the Madawaska Line or the Line, runs between Madawaska, ME, and the Canadian border, and serves a paper mill owned by Fraser at Madawaska.<sup>1</sup>

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<sup>1</sup> On August 27, 2002, the Montreal, Maine & Atlantic Railway, LLC filed a notice of exemption pursuant to 49 CFR 1150.31, et seq., to acquire and to operate the rail lines and other rail assets of BAR. Notice of the exemption was served and published in the Federal Register on  
(continued...)

The rights at issue in these proceedings were created as part of a March 2001 agreement between CN and BAR (the March 2001 Transaction), under which CN gave BAR's parent company \$5 million in return for the creation of these rights and the execution of a haulage agreement allowing CN to deal directly with Fraser. Under the haulage agreement, BAR crews and equipment perform the physical transportation under contract with CN, and CN quotes rates to Fraser. CN has not used the trackage rights at issue in these proceedings. Instead, CN has served Fraser under the haulage agreement reached with BAR as part of the March 2001 Transaction.<sup>2</sup> Haulage agreements are not subject to our jurisdiction.

On November 14, 2002, the Trustee served 7 interrogatories and 10 document requests on Fraser. Specifically, the Trustee's discovery request is designed to elicit two categories of information: (1) information that is allegedly relevant to the transportation options available to Fraser at its Madawaska Mill; and (2) Fraser's evaluation of its transportation options as contained in any communications relating to (a) BAR's financial condition, (b) BAR's sale as part of its bankruptcy, and (c) the agreement between CN and BAR out of which arose the trackage rights and easement that are at issue in these proceedings. Fraser asserts that it has not responded to either the interrogatories or the documents.

By motion filed on December 6, 2002, the Trustee asks the Board to compel Fraser to respond to discovery requests, or, in the alternative, to issue a subpoena duces tecum.<sup>3</sup> The Trustee argues that it is entitled to the information because it is relevant to the issue of the extent to which Fraser actually benefits from the service option that the Trustee is attempting to extinguish. On December 13, 2002, Fraser filed a reply in opposition to the Trustee's motion.

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<sup>1</sup>(...continued)

September 19, 2002. In a decision served December 18, 2002, we authorized substitution of Montreal, Maine & Atlantic Railway, Ltd. (MMA) as the party authorized to acquire the assets of BAR. References in this decision to BAR also refer, as appropriate, to MMA following its acquisition of BAR's assets.

<sup>2</sup> In decisions served in these proceedings on September 25, 2002, and October 23, 2002, the Board discussed the background of these matters and granted the Trustee waivers of, and exemptions from, certain regulatory and statutory requirements in connection with the applications. For additional background information, see Canadian National Railway Company – Trackage Rights Exemption – Bangor and Aroostook Railroad Company and Van Buren Bridge Company, Et Al., STB Finance Docket No. 34014 et al. (STB served June 25, 2002) (CN – Trackage Rights Exemption – BAR).

<sup>3</sup> By a companion motion, the Trustee also moved to compel CN and Waterloo to respond to discovery requests. We have addressed those in a separate decision (herein, CN Discovery) served today in these proceedings.

## DISCUSSION AND CONCLUSIONS

Under 49 CFR 1114.21(a) and (c), discovery must be “relevant to the subject matter involved in a proceeding.” The requirement of relevance means that the information might be able to affect the outcome of a proceeding. Under 49 CFR 1114.21(c), discovery may also be denied if it would be unduly burdensome in relation to the likely value of the information sought. Also at issue is whether the information ought to be obtained through discovery rather than some other means.<sup>4</sup>

The instant proceedings require an assessment of the public interest. Part of that entails a balancing of the interests of the estate of BAR and its creditors against the interests of CN and Fraser. The Trustee maintains that the public interest would be better served if we were to remove CN’s right to operate over the track because this right is burdensome to BAR’s estate and results in the estate receiving a lower price for the sale of its assets. According to the Trustee, the termination of CN’s right to operate over the track would not adversely affect Fraser. On the other hand, CN and Fraser maintain that the public convenience and necessity would be better served if we were to allow Fraser to continue to receive the benefit of the right to provide competitive rail service that CN acquired in the March 2001 Transaction. The relevance of the Trustee’s discovery requests turns on whether the information requested would be likely to affect the outcome of these proceedings by helping us to conduct this balancing of interests.

As part of its argument, the Trustee seeks to show that Fraser does not need competitive rail service by CN or Waterloo. The extent to which Fraser would benefit from the availability of the CN/Waterloo rights that the Trustee seeks to terminate is relevant to our analysis of the public interest.<sup>5</sup> To determine how Fraser would be affected by the elimination of the trackage rights, the Trustee may benefit from some of the information it seeks.

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<sup>4</sup> A non-party can be compelled to respond only to a subpoena issued pursuant to 49 U.S.C. 721(c). This provision allows the Board to subpoena “witnesses and records related to a proceeding of the Board.” Fraser has not challenged our jurisdiction to compel answers to the Trustee’s discovery.

<sup>5</sup> Fraser cites precedents allegedly holding that discovery against shippers in abandonment proceedings is disfavored because (1) discovery against shippers would cause them to refrain from participating in abandonment proceedings and (2) railroads typically can obtain the information they seek by other means. The precedents cited by Fraser do not support its argument for total immunity against discovery in this proceeding. These precedents were decided in the context of traditional abandonment or discontinuance of service proceedings, not adverse abandonments or discontinuances.

Two types of information which the Trustee wants may be relevant to the analysis which we must conduct. The Trustee seeks to argue that the elimination of the trackage rights would not unduly harm Fraser because it enjoys competitive service from trucks. We will therefore require Fraser to provide information on its trucking service that competes with rail. Second, the Trustee seeks information on the rates that Fraser has paid to CN under the haulage agreement. That information could be relevant to the extent of competition resulting from the March 2001 Transaction and could indicate the corresponding benefits which Fraser has realized under that transaction. That information may also be relevant to the balancing of interests that we will need to do to decide this case. We understand that this is commercially sensitive information, and we expect that adequate confidentiality provisions will be implemented.

As noted, the Trustee would benefit from information on the extent to which Fraser's traffic could move by truck. Any comparisons, however, must focus on the same origin-to-destination movements that are involved in BAR (now MMA) service via the subject track. Thus, the Trustee's document request No. 8 is too broad. The information on Fraser's ownership of trucks or rail equipment, requested in Interrogatories 5 and 6, is irrelevant to these proceedings and will not be required. Whether Fraser could move the goods by an alternate mode really depends on the availability and economics of truck service routes. Moreover, if Fraser is using its own equipment to serve its plant by truck, such use will be reflected in the answers provided in response to the questions in the Appendix to this decision, discussed below.

The only requests for documents that are substantially relevant to the issue of Fraser's ability to use alternate modes of transport are Nos. 9 and 10. We will allow these requests because they are reasonably sharply focused on the ability of a competing mode to serve Fraser. Confidentiality issues can be handled via protective orders.

The remaining document requests seek information that would be burdensome for Fraser to produce, and the Trustee has failed to demonstrate that they are likely to affect the outcome of these proceedings. Among those requests is the information requested in Document Requests 2, 5, and 6, which falls into five topics: (1) the March 2001 Transaction; (2) the acquisition of the BAR System by the MMA; (3) the viability of the BAR System; (4) the consequences of events that might affect the service provided by BAR, such as BAR's bankruptcy; and (5) the effect of the relief sought by the Trustee in these proceedings. For the reasons we denied those requests in CN Discovery, we deny them here.

Based on the foregoing discussion, we will not issue a subpoena against Fraser, but we will require Fraser to respond to the discovery to the extent allowed in this decision. The limited discovery that we are allowing appears in the Appendix.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Trustee's motion to compel responses to discovery is granted to the extent discussed in this decision.
2. This decision is effective on its date of service.

By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams  
Secretary

APPENDIX

Based on the discussion in the body of this decision, we will require Fraser to provide the information described below to the Trustee:

A. The following information, guided by the definitions and instructions on pp. 29-32 of the Trustee's motion to compel:

1. The rates paid to CN under the haulage agreement and volume shipped (by carload, tonnage or other relevant measurement), grouped by commodity (STCC code) and origin (for inbound traffic) or destination (for outbound traffic), from March 1, 2001 through the end of calendar year 2002.

2. The rates paid for movement by truck and volumes shipped (by truckload, tonnage or other relevant measurement) of each commodity listed in the response to 1 (above) involving the same origins and destinations, again grouped by commodity (STCC code) and origin (for inbound traffic) or destination (for outbound traffic), from March 1, 2001 through the end of calendar year 2002.

B. Document Requests:

BAR's document requests No. 9 and No. 10.